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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN MACK LESHER,

Defendant and Appellant.

E032158

(Super.Ct.No. FVI 12321)

OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers, Judge. Affirmed.

David P. Elder for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steven T. Oetting, Supervising Deputy Attorney General, and Lise Jacobson, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Defendant John Mack Leshar appeals from a judgment convicting him of involuntary manslaughter for killing a woman while he was driving under the influence. On appeal, defendant asserts the following claims: the trial court erred in denying his request to withdraw his waiver of his right to a jury trial; the prosecutor committed misconduct in obtaining and presenting the blood analysis evidence; defendant's trial counsel provided ineffective assistance in failing to file certain motions and retain expert witnesses; and the trial court erred in denying defendant's motion for new trial on the grounds of insufficient evidence.

For the reasons provided below, we reject all of defendant's arguments and we affirm his conviction.

2. Factual and Procedural History

On May 13, 2000, defendant was treated at St. Mary's Regional Medical Center in Victorville. Upon being discharged from the hospital, the nurse advised defendant not to drink or drive after taking his prescription narcotic pain medication, which included Vicodin, Benzodiazepine, and Klonopin.

At 10:00 or 11:00 a.m. on May 15, 2000, various individuals from defendant's apartment complex observed defendant as "off balance," "staggering," with slurred speech, and droopy and glazed eyes. That day, inside defendant's apartment, the maintenance man discovered a white powdery and brown granular residue on a mirror on defendant's sink counter. He also found a hypodermic needle on the floor. At 11:00

a.m., both the apartment manager and one of defendant's neighbors noticed defendant getting into his car and driving away from the complex at a high rate of speed.

At 12:00 p.m. on May 15, 2000, witnesses observed defendant's Cadillac moving at speeds over 100 miles per hour. Defendant was weaving between lanes on Air Expressway, which had a 65 miles per hour speed limit, as he approached the intersection at Village Drive. In her Buick, Rosella Furr turned left at the intersection with a green left turn arrow. Defendant did not slow down or apply his brakes. Defendant ran the red light and collided into Furr's Buick.

The subsequent investigation revealed that Furr's Buick was already 40 feet from the left turn pocket when defendant collided into her car. Before the point of impact, Furr was traveling at approximately 13 miles per hour while defendant was traveling up to 92 miles per hour. A technician for the City of Victorville noted that the traffic signal at the intersection of Air Expressway and Village Drive was working properly on the day of the collision.

Blood tests revealed that defendant's blood contained a substantial amount of benzoylecgonine (BE), which is a cocaine metabolite, as well as small amounts of Vicodin and Xanax. The presence of BE indicated cocaine use within the last 24 hours. The expert opined that defendant's ability to drive was impaired by ingesting the combination of drugs.

Furr died at the scene. The cause of her death was blunt trauma to her head and neck.

The San Bernardino County District Attorney charged defendant with gross vehicular manslaughter while intoxicated in violation of Penal Code¹ section 191.5, subdivision (a). The district attorney also charged defendant with a prior prison term conviction allegation under section 667.5.

After defendant waived his right to a jury trial, the court held a bench trial and, thereafter, found defendant guilty of the substantive charge. The court did not find true the prior conviction allegation. For the substantive crime, the court selected the aggravated prison term of 10 years.

3. Jury Trial

Defendant claims that he was denied his constitutional right to a jury trial. Defendant argues that the record fails to establish that he made a knowing, intelligent, and voluntary waiver.

Both the Sixth Amendment of the federal Constitution, made applicable to the states by the Fourteenth Amendment, and article I, section 16 of the California Constitution confer upon a criminal defendant a right to a trial by jury.² The defendant, however, may choose to relinquish this right.³ The court may not accept defendant's waiver unless it is knowing and intelligent (i.e., made with a full awareness of the nature of the right being relinquished and the consequences of his choice), and voluntary (i.e.,

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

² *People v. Collins* (2001) 26 Cal.4th 297, 304.

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the product of free and deliberate choice rather than any improper motivation such as coercion or deception).⁴

The defendant must expressly waive his right to a jury trial in open court.⁵ While no specific formula is required, the record must contain direct evidence that the defendant was fully aware of his rights.⁶

Contrary to defendant's argument, the record in this case contains the transcript of defendant's personal waiver. One day before the trial, August 29, 2001, defendant informed the court of his desire to waive his right to a jury trial. Defendant said that he understood his rights. When asked if he was prepared to waive his right to a jury trial, defendant responded in the affirmative. The record shows that defendant, defense counsel, and the prosecutor agreed to waive a jury trial and proceed with a court trial.

Nevertheless, defendant appears also to claim that the court erred in denying his request to withdraw his waiver. During the trial, despite defendant's repeated requests, the trial court acted well within its discretion in denying defendant's request to withdraw his waiver. "Absent special circumstances the court may deny a motion to withdraw such a waiver especially where adverse consequences will flow from the defendant's change

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³ *People v. Collins*, *supra*, 26 Cal.4th at page 305.

⁴ *People v. Collins*, *supra*, 26 Cal.4th at page 305.

⁵ California Constitution, article 1, section 16; see *People v. Wrest* (1992) 3 Cal.4th 1088, 1102.

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of mind. In exercising its discretion the court may consider such matters as the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion.”⁷

As noted by the People, defendant first requested to withdraw his waiver after the start of trial and after the prosecution had commenced the presentation of its case-in-chief. Defendant’s request, therefore, was untimely and would have prejudiced the prosecution.

Furthermore, nothing in the record indicates that defendant’s wavier was defective because of any mental infirmity caused by being deprived of his prescription narcotic medication. Defendant informed the court that he regularly took prescription pain medication for injuries caused by a different traffic collision. Defendant also testified that, on Tuesday, August 28, 2001, the personnel at the correctional facility disciplined him by segregating him and depriving him of his medication. Despite defendant’s testimony, the prosecutor noted that defendant, even without his medication, was able to think coherently and testify competently.

The court found that defendant was sufficiently competent to understand the nature of the proceedings and assist his attorney with his defense. The court found that,

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⁶ *People v. Wrest, supra*, 3 Cal.4th at page 1103.

⁷ *People v. Chambers* (1972) 7 Cal.3d 666, 670-671.

even if defendant was deprived of his medication, it did not compromise his ability knowingly and intelligently to waive his right to a jury trial. When defendant renewed his requests, the court again commented on the validity of defendant's waiver. During one instance, the court noted that defendant had his medication up to Wednesday, August 29, 2001. When the parties again revisited the issue, the court remarked, "The jury waiver . . . was made on approximately the same day that the medication had stopped. But the thing is, the Court did look at the defendant, talk to the defendant, got a personal waiver from the defendant, and he didn't seem to be impaired in any way at that time."

The record fails to support any grounds for allowing defendant to withdraw his valid waiver. We therefore conclude that the trial court did not deprive defendant of his right to a jury trial.

4. Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct in both failing to provide a copy of the investigation report of the collision in a timely manner and failing to provide a sample of defendant's blood for retesting.

In asserting these claims, defendant fails to provide any details or citations to the record. As noted by the People, this alone provides grounds for rejecting defendant's arguments.⁸

⁸ *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 (holding arguments without citation should be stricken and deemed waived).

Another ground for rejecting defendant's argument is the absence of a timely and specific objection. In order to preserve the issue for appeal, defendant must object to the offending act or item of evidence on the basis of prosecutorial misconduct at trial.⁹

Defendant's failure to raise a specific objection effectively waives the issue for appeal.

In addition to these procedural flaws, defendant's arguments also lack substantive merit. Well-settled rules apply to a claim of prosecutorial misconduct. "Under the federal Constitution, to be reversible, a prosecutor's improper comments must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.] "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]' [Citation.]"¹⁰

A. MAIT Report

Defendant first claims the prosecutor committed misconduct by requesting a continuance "for the purpose of creating evidence that did not already exist." Although defendant mentions "an expert test," he fails to specify which expert and what test. The People note that defendant is likely referring to the "MAIT report" of the traffic collision.

⁹ See *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.

¹⁰ *People v. Cunningham, supra*, 25 Cal.4th at page 1000; *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.

On May 9, 2001, the prosecutor filed a motion to continue the trial on the grounds that the prosecutor was waiting to receive the report from the Major Accident Investigation Team (MAIT) for the City of Victorville on the technical analysis of the collision. The record does not contain another prosecution request for a continuance on the basis of conducting or receiving the results of any further analysis. On August 22, 2001, the prosecutor faxed a copy of the investigative report to defendant's trial attorney. On September 4, 2001, after receiving a revised copy of the report with different speed calculations, defense counsel requested a one-day continuance to review the report. On the next day, defense counsel moved to withdraw defendant's waiver of his right to a jury trial on the grounds of his compromised mental state, as discussed above, and the revised report. Defendant's attorney noted the late delivery of the revised report.

The late delivery, however, did not amount to prosecutorial misconduct. While the new report contained information that defendant was closer to the intersection when Furr started making her left turn, this favorable evidence was given to the defendant in a timely manner.

Generally, due process requires that the prosecutor disclose to the defense any favorable, material evidence.¹¹ This requirement includes the duty to learn of such

¹¹ *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7, citing *Brady v. Maryland* (1963) 373 U.S. 83, 86-87.

evidence known to others acting on behalf of the government.¹² The prosecutor, however, has no obligation to disclose evidence before it exists.¹³

In this case, nothing in the record suggests that the prosecutor could have discovered or produced the report earlier.¹⁴ MAIT conducted the new tests on Friday night, August 31, 2001. Apparently, Gregg Grimm, a member of MAIT, realized that he had made an error in the calculations by using miles per hour, rather than feet per second, in one of the formulas. A few days later, the prosecution provided defendant with a copy of the revised report. Defendant fails to establish that the prosecutor's delivery of the revised report was not timely. Nothing in the record indicates that the prosecutor's handling of this evidence was in some way deceptive or reprehensible. We conclude, therefore, that the prosecutor did not commit misconduct by delaying the trial or providing a copy of the revised report in an untimely manner.

B. Blood Evidence

Defendant's remaining claims of prosecutorial misconduct pertain to the blood evidence. Defendant complains that the prosecutor failed to provide a sample for defense testing.

¹² *City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th at page 8.

¹³ *People v. Carpenter* (1997) 15 Cal.4th 312, 386.

¹⁴ *People v. Gatlin* (1989) 209 Cal.App.3d 31, 38.

On September 19, 2001, defendant's trial attorney moved to exclude all the evidence and testimony concerning the blood test results on the ground that the prosecution failed to preserve a sample for retesting.

The prosecutor responded that retesting was impossible because the samples were exhausted during the original tests. Dale Sommers, a toxicologist with Bio-Tox Laboratories, provided testimony concerning the blood tests. He explained that, contrary to standard practice, both split samples were sent to Bio-Tox Laboratories. Sommers testified that he exhausted the samples provided to him during the testing process.

Due process does not require that defendant has a right to retest evidence when the evidence was exhausted during the investigation.¹⁵ Furthermore, even if the police could have obtained a larger sample, nothing in the record suggests that law enforcement or the prosecution intentionally prevented the defense from having access to exculpatory evidence.¹⁶ Also, nothing in the record indicates that the original test results were anything less than completely accurate. In fact, defense counsel even noted for the record that he also used Bio-Tox Laboratories for over 20 years.

¹⁵ See *People v. Axell* (1991) 235 Cal.App.3d 836, 868-869, citing *People v. Griffin* (1988) 46 Cal.3d 1011, 1021.

¹⁶ See *People v. Zapien* (1993) 4 Cal.4th 929, 963-965, applying *California v. Trombetta* (1984) 467 U.S. 479, 488-489 (requiring materiality) and *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (requiring bad faith for failing to preserve exculpatory evidence).

We conclude that defendant has failed to show any prosecutorial misconduct in failing to preserve a blood sample for retesting.

5. Ineffective Assistance of Counsel

Defendant claims his trial attorney provided ineffective assistance of counsel by failing to move to suppress the blood evidence, failing to retain expert witnesses, and failing to file a *Pitchess*¹⁷ motion.

To establish constitutionally ineffective representation, defendant must show both that trial counsel's performance fell below the standard of a diligent and reasonably competent attorney and that it is reasonably probable that a more favorable outcome would have resulted absent counsel's deficient performance.¹⁸ ““A reasonable probability is a probability sufficient to undermine confidence in the outcome.””¹⁹ Generally, trial counsel is accorded substantial deference in making various tactical decisions, including the decision to object to inadmissible evidence.²⁰ The failure to

¹⁷ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

¹⁸ *People v. Lewis* (1990) 50 Cal.3d 262, 288, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Fosselman* (1983) 33 Cal.3d 572, 584; *People v. Pope* (1979) 23 Cal.3d 412, 425.

¹⁹ *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212, quoting *Strickland v. Washington*, *supra*, 466 U.S. at page 694.

²⁰ *People v. Riel* (2000) 22 Cal.4th 1153, 1185.

object to evidence will rarely constitute ineffective assistance.²¹ And a reviewing court will not second-guess counsel's reasonable decisions in matters of trial tactics.²²

A. Blood Evidence

Defendant first claims that his trial attorney provided constitutionally defective assistance by failing to object to the admission of the evidence of defendant's blood test results. As discussed above, however, the record shows that defendant's trial attorney objected to all the expert testimony on the blood test results.

B. Expert Witnesses

Defendant next claims that he received ineffective assistance because his trial attorney failed to retain expert witnesses to testify concerning defendant's blood test results and the traffic collision.

As a tactical matter, the decision to call or retain expert witnesses is best left to trial counsel's discretion.²³ The record in this case does not reveal the reason for defense counsel's decision not to call experts to testify on defendant's behalf. Nevertheless, there is no indication in the record that the prosecution's expert witnesses concerning defendant's blood test results and the collision analysis were inaccurate or unreliable.²⁴

²¹ *People v. Riel, supra*, 22 Cal.4th at page 1185.

²² *People v. Riel, supra*, 22 Cal.4th at page 1185.

²³ See *People v. Medina* (1995) 11 Cal.4th 694, 773; *People v. Wash* (1993) 6 Cal.4th 215, 270.

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It is also pure speculation to assume that defense expert witnesses would have been able to provide exculpatory evidence.²⁵

As to the blood evidence, defendant specifically states that his trial counsel should have called an expert to testify concerning the long-term effects of certain pain medication, including Vicodin. Defendant also states that an expert was necessary to provide another opinion on defendant's condition at the time of the collision. Defendant's trial attorney, however, stipulated to toxicologist Maureen Black's qualifications as an expert. Black, who worked for Bio-Tox Laboratories, provided testimony on defendant's condition as revealed by the various chemicals in his blood at the time of the collision. Black also testified concerning the effects of various pain medications. While Black may not have discussed specifically the long-term effects of the drugs, defendant fails to show how such evidence would be exculpatory. We also note that, as stated above, defendant's trial attorney informed the court that he often used Bio-Tox Laboratories as an alternative crime lab. Therefore, because there is nothing to suggest that Black's testimony was unreliable, we cannot fault defense counsel for not calling another expert simply to reiterate and reinforce the incriminating results of defendant's blood tests.

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²⁴ See *People v. Price* (1991) 1 Cal.4th 324, 440.

²⁵ *People v. Catlin* (2001) 26 Cal.4th 81, 176.

Defendant also faults trial counsel for failing to retain an accident reconstruction expert to testify concerning the timing of the yellow light at the intersection of Air Expressway and Village Drive. As noted by the People, defendant did retain and consult with Morley Jones. While the record does not explain counsel's reasons for not calling Jones to testify, the record shows that counsel was concerned about the timing of the yellow light and the possibility that such evidence would benefit defendant at trial. From this record, defendant cannot establish that his trial attorney did not fully investigate the matter before deciding not to call Jones to provide testimony at trial. Again, counsel may have been satisfied with the prosecution witnesses, Deputy Gregg Grimm and Signal Technician Louie Rodriguez, and may not have been able to add anything further to benefit defendant's case by calling other expert witnesses.

In both instances, defendant has failed to show that his trial attorney provided ineffective assistance in deciding to not present additional expert testimony at trial.

C. Pitchess Motion

In his final challenge to trial counsel's performance, defendant claims that his trial attorney provided ineffective assistance in failing to file a *Pitchess* motion or to further investigate the potential conflict created by the trial judge's relationship to one of the police officers who testified at trial.

Defendant does not specify with which officer the trial judge allegedly had a professional or personal relationship. The People noted that, at trial, while the prosecutor

mentioned Deputy Grimm in his response to defendant's motion for new trial, there was no indication of any relationship between the judge and Deputy Grimm.

On appeal, the People assume that defendant is referring to Deputy Mike Bigbee. During the trial, defendant's trial attorney made a motion for mistrial on the grounds that the judge, the Honorable Margaret Powers, had a potential conflict with Deputy Bigbee because she was having transmission work done at Deputy Bigbee's auto repair shop. The court explained, ". . . I did mention to counsel yesterday that it turned out that my husband had taken his vehicle to Deputy Bigbee's business which is A&A Transmission, I think is the name of it. He's taken vehicles there before. I didn't go with him. I don't know if he saw Deputy Bigbee or talked to him or not. I certainly didn't because I wasn't there, and I don't think there's anything about that that causes me to be biased one way or another in this case."

Based on this record, there is nothing to suggest that defense counsel provided ineffective assistance by failing to either file a Pitchess motion or to investigate the matter further. There was no need to investigate when the court fully explained the connection it had with Deputy Bigbee.

As to the *Pitchess* motion, defendant fails to establish what would be gained by having access to Deputy Bigbee's personnel records. Generally, a defendant files a *Pitchess* motion to compel discovery of an officer's personnel file to find information

relevant to defend against the criminal charge.²⁶ Defendant's limited right to such information is based on the fundamental proposition that a defendant is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.²⁷ The defendant may compel discovery by demonstrating that the information will facilitate the ascertainment of facts and a fair trial.²⁸

Based on Judge Power's description, Deputy Bigbee's personnel records would not likely contain any additional information concerning the connection. And defendant fails to suggest what information from the officer's records would assist in his defense. Trial counsel was not required to make a useless or frivolous motion.²⁹

We conclude that defendant has failed to show that his trial attorney provided ineffective assistance in preparing and presenting his defense.

6. New Trial

Defendant claims the trial court erred in denying his motion for new trial. Specifically, defendant argues that insufficient evidence supported the judgment because other evidence supported his innocence, including the other driver's negligence, the expert's concession that defendant did not have cocaine in his blood, the traffic expert's

²⁶ *People v. Mooc* (2001) 26 Cal.4th 1216, 1219.

²⁷ *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1141.

²⁸ *City of San Jose v. Superior Court*, *supra*, 67 Cal.App.4th at page 1141.

²⁹ See *People v. Weaver* (2001) 26 Cal.4th 876, 931.

evidence concerning the traffic signal at the intersection where the accident occurred, and defendant's history of using medication to treat his disease.

Under section 1181, subdivision (6), the trial court may grant a new trial on the grounds that the verdict is contrary to the law or evidence. Guided by a presumption of correctness, the trial court must weigh the evidence independently to determine whether sufficient evidence supports the verdict.³⁰ On appeal, the reviewing court must uphold the trial court's decision unless the record clearly reveals a manifest and unmistakable abuse of discretion.³¹ We must defer to the trial court's factual determinations in assessing the credibility of witnesses and resolving conflicts in the evidence.³²

In support of his claim, defendant discusses various items of evidence that conflict with the court's factual findings. For instance, defendant claims that because the victim entered the intersection into oncoming traffic, she was contributorily negligent. Defendant also claims that Black erroneously testified concerning the effects of cocaine when defendant tested negative for cocaine. These and the other factual matters discussed in defendant's opening briefs were presented to the court and resolved against

³⁰ *People v. Davis* (1995) 10 Cal.4th 463, 523-524.

³¹ *People v. Davis, supra*, 10 Cal.4th at page 524.

³² *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1160.

defendant. This court must give great deference to the trial court's factual determinations.³³

Furthermore, ample evidence in the record supported the court's verdict. Particularly, although Black, the prosecution's toxicologist, testified that while defendant's blood did not contain cocaine, it did contain 687 nanograms per milliliter of BE, which is the most abundant metabolite that remains present in the blood after a person ingests cocaine. BE may remain in the blood for about 24 hours after ingestion. Based on the presence of BE and the other drugs in defendant's blood, Black opined that defendant was under the influence while driving. The evidence showed that defendant drove after ingesting cocaine and consuming other narcotic medications, despite the prescription drug warnings. Based on the eyewitness testimony, defendant drove erratically, accelerated up to speeds of 100 miles per hour, ran a red light, and collided into Furr's vehicle. The evidence in the record supports the court's ruling.

We conclude the trial court properly denied defendant's motion for new trial.

7. Disposition

We affirm defendant's conviction.

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³³ *People v. Hinks, supra*, 58 Cal.App.4th at page 1160.

/s/ Gaut
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.